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IN THE

Supreme Court of the United States

October Term, 1970
No. ~~1479~~ 70-235

RICHARD A. BUBLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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October Term, 1970
No. .....

RICHARD A. BUBLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner is Richard A. Buble. Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 8, 1971.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at 1A. There was no written opinion of the United States District Court for the Central District of California.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 8, 1971, and this Petition for Certiorari was filed within the time allotted by Order Extending Time to File Petition for Writ of

Certiorari to June 7, 1971, signed by Mr. Justice Douglas, copy appearing in the Appendix hereto at 3A.

The United States Court of Appeals for the Ninth Circuit entered its Order Staying Issuance of Mandate pending disposition of this Petition. A copy thereof appears in the Appendix at 4A.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The basic questions presented are of extreme Constitutional sensitivity and relate to violations of guarantees therein contained.

The precise questions presented in this case are:

1. Whether a defendant may be compelled to answer for an infamous crime without indictment of a Grand Jury, when the trial court amends the Grand Jury's indictment by a writing on the face thereof and

substitutes its own indictment for that of the Grand Jury, before the admission of any evidence or testimony upon which the court might rely in support of its precipitous and drastic intervention.

2. Whether a defendant (after having been indicted by the Grand Jury, arraigned, pled "not guilty" and placed in jeopardy before the trial jury) may be twice put in jeopardy for the same offense, and forced to go to trial without further arraignment or plea under a new and substituted indictment of the court.

3. Whether under the Fifth Amendment of the United States Constitution; *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849; *Stirone v. United States,* 361 U.S. 212, 4 L. Ed. 252; *Russell v. United States,* 369 U.S. 749, 8 L. Ed. 2d 240, and whether under decisions within its own jurisdiction, *i.e., Stewart v. United States* (C.A. 9, 1926) 12 F. 2d 524; *Stewart v. Dist. Crt.* (C.A. 9, 1926) 16 F. 2d 863, *cert. denied,* 273 U.S. 755, 71 L. Ed. 875; *Edgerton v. United States* (C.A. 9, 1944) 143 F. 2d 697 and *Carney v. United States* (C.A. 9, 1947) 163 F. 2d 784, *cert. denied,* 332 U.S. 824, 92 L. Ed. 400, as well as a host of decisions in the other circuits,[1] a trial judge may, in anticipation of proof, and in the absence of any testimony or evidence whatever, amend the Grand Jury's indictment *in a matter of critical substance* by written deletions and insertions on the face thereof and in the body of the said indictment.

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[1]*Dodge v. United States* (C.A. 2, 1919) 258 Fed. 300, cert. denied, 250 U.S. 660, 63 L. Ed. 1194; *United States v. Krepper* (C.A. 3, 1946) 159 F. 2d 958, cert. denied, 330 U.S. 824, 91 L. Ed. 1858; *United States v. Critchley* (C.A. 3, 1965) 353 F. 2d 358; *Dowdy v. United States* (C.A. 4, 1931) 46 F. 2d 417; *Garrett v. United States* (C.A. 5, 1927) 17 F. 2d 479; *Meller v. United States* (C.A. 8, 1947) 160 F. 2d 757, cert. denied, 331 U.S. 848, 91 L. Ed. 1858; *Gaither v. United States* (C.A. D.C., 1969) 413 F. 2d 1061.

Constitutional and Statutory Provisions Involved.

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 26:

§6531(2). *Applicable Statute of Limitations:*

"No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years after the commission of the offense, except that the period of limitation shall be 6 years— . . .

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;"

United States Code, Title 26:

§7201. *Willful Attempt to Evade or Defeat the Tax.*

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case.

The petitioner was indicted by the duly constituted Grand Jury in the Southern District of California, Central Division, on April 1, 1970. The petitioner was charged with two counts of violation of 26 U.S.C. §7201 (wilful attempt to evade and defeat income tax by filing false and fraudulent income tax return). The income tax returns of petitioner and his wife for all years herein mentioned have been filed with the District Director of Internal Revenue at Los Angeles, California, within the jurisdiction of the United States District Court for the Southern District of California, Central Division, and the United States Court of Appeals for the Ninth Circuit.

The aforesaid indictment of the Grand Jury appears in the Appendix hereto at 5A, but the charging sections thereof are quoted here for convenience:

"COUNT ONE
(26 U.S.C. §7201)

That on or about the 15th day of April, 1963, in the Central Division of the Southern District of California, defendant RICHARD A. BUBLE, a resident of Los Angeles County, who during the calendar year 1963 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1963, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated

that their taxable income for said calendar year was the sum of ($119.67) and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $19,081.18, upon which said taxable income there was owing to the United States of America an income tax of $4,967.60.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201."

"COUNT TWO

(26 U.S.C. §7201)

That on or about the 15th day of April, 1964, in the Central Division of the Southern District of California, defendant RICHARD A. BUBLE, a resident of Los Angeles County, who during the calendar year 1964 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1964, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for the said calendar year was the sum of ($58.35) and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $23,259.46, upon which said taxable income there was owing to the

United States of America an income tax of $5,828.22.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201."

On April 13, 1970, the petitioner was arraigned under the terms of the aforesaid indictment and pled "not guilty" to both counts thereof. The matter was set for trial in the United States District Court for the Southern District of California, Central Division, on May 26, 1970.

On May 14, 1970, the respondent filed its Trial Memorandum signed by the United States Attorney, in which the Grand Jury's indictment was set forth verbatim, as above quoted.

On May 26, 1970, the trial judge read to the panel of jurors Count One of the Grand Jury's indictment verbatim. The United States Attorney raised an objection to an inadvertent error in the reading of said count, but made no objection and raised no question as to the substance and context thereof. The court then read Count Two verbatim, and again the United States Attorney did not question the wording of the indictment as read to the jury.

The jury was impaneled and sworn, placing the defendant in jeopardy under the counts of the said indictment returned by the Grand Jury on April 1, 1970. (On the point of commencement of jeopardy, please see *Himmelfarb v. United States* (C.A. 8, 1949) 175 F. 2d 924, cert. denied, 338 U.S. 860, 94 L. Ed. 527.)

Although the petitioner stood in jeopardy before the trial jury, having been duly arraigned, and entered his plea of "not guilty" to the Grand Jury's indictment

and having indicated his readiness to proceed, he did not go to trial under the Grand Jury's indictment. Instead, the court saw fit on its own volition to amend the said indictment by a writing on the face thereof. This took place even before opening statements of counsel, and before the introduction of any testimony or evidence. Petitioner was compelled to proceed to trial under the substituted indictment without further arraignment or opportunity to plea, thereby being placed twice in jeopardy for the same alleged offense.

Counsel for petitioner, after the impanelment and swearing of the trial jury and before the court's undertaking to amend the Grand Jury's indictment, moved that Count One of the said indictment be dismissed on the ground that it was barred by the Statute of Limitations on its face. 28 U.S.C. §6531 provides a period of six years from the date of the alleged offense within which a person may be prosecuted, tried or punished for wilfully attempting to evade or defeat any tax. The Grand Jury's indictment was returned April 1, 1970, thus six years from the date of the alleged attempt, *i.e.*, April 15, 1963, would have fallen on April 15, 1969, and prosecution was thereby barred by almost a full year prior to the return of the said indictment.

Counsel for petitioner took the position that Count Two of said indictment clearly indicated that the alleged offense occurred on or about the 15th day of April, 1964, and that the admission of any evidence or documents tending to prove or establish the commission of any offense remote to that date should be excluded. Counsel for petitioner further contended that the admission of any such evidence would be irrelevant and highly prejudicial to the rights of the petitioner,

and that such evidence, if admitted, could only result in a fatal variance if it related to an attempt to evade separated by almost twelve months from the date alleged. Counsel for petitioner later, *but prior to the introduction of any evidence,* moved for dismissal of the said Count Two, relying on the repeated statement of the trial court, that the same did not state a cause of action and the case could not go to the jury thereunder.

In order to place before this Court the rationale and rhetoric leading to the ultimate errors herein, there follaw excerpted quotations by the court and the United States Attorney. The references appearing in brackets at the end of each quotation are a source identification thereof from the Reporter's Transcript, a part of the record below, and they are included here as a convenience to counsel for respondent in preparation of Brief in Opposition to this Petition.

> (THE COURT) "But first of all let's take up Count One. It seems to me that Count One goes out the window.
>
> MR. FRANK (United States Attorney): I would most respectfully submit, your Honor, that it should not.
>
> THE COURT: Why? There has to be at least a year's variance between what you can prove—you're not going to talk about the return of '63 being made in '64, are you?" [Rep. Tr. p. 26, lines 15-22.]
>
> * * *
>
> MR. FRANK: "Any reasonable interpretation of Count One of the indictment leads to the conclusion, and to no other conclusion, that the defendant is charged with an income tax evasion for

the calendar year 1963, for the return that he filed—

THE COURT: I think, on the other hand, it might well be assumed, and I think more reasonably assumed, that he did the evasion on the filing of April 15, '63, but it was for the calendar year '62. I don't think it matters what calendar year it was for. The question is when is it charged that he did the evading. When was the attempt made to evade, that was allegedly by the tax return, regardless of what taxable year it might cover." [Rep. Tr. p. 28, lines 8-21.]

In the following dialogue the court concluded that the Grand Jury indictment did not state a cause of action, since (as hereinafter indicated) the court on several occasions stated that the case could not be submitted to the trial jury thereunder.

MR. FRANK: "Most respectfully, the Government would submit that the indictment does not have to be amended.

THE COURT: I think it does. Otherwise the jury will be so confused they won't know what you are talking about." [Rep. Tr. p. 53, lines 21-25, p. 54, line 1.]

* * *

THE COURT: "Well, I'll tell you what I am going to do. I am not going to hold this jury any more. I am going to overrule the motions at this time, both of them.

I'm going to amend the complaint, come hell or high water. They'll take it up and if I am reversed, it's what the Government wants because I don't think you can submit it intelligently to this jury without the complaint being amended.

Now, if you don't like it, you can go ahead and dismiss before I do it.

MR. FRANK: Your Honor, perhaps I misstated myself before. The portion of the indictment on or about such and such a date the Government submits is surplusage which your Honor can amend that properly. That is the Government's position, that it can be amended." [Rep. Tr. p. 64, line 20, to p. 65, line 9.]

* * *

THE COURT: "All right, let's call the jury down and proceed. We are getting a late start with this case, and we only have today, tomorrow and Thursday, so we have to move along. * * *

THE COURT: Let the record show the jury has returned to the courtroom.

Ladies and gentlemen of the jury, we have had a very difficult, very, very difficult legal problem that I have never run into before. I had to read a lot of authorities and do some research on it.

The attorneys did research all through the noon hour, but I have resolved it, at least for the moment.

And I must, once again, now tell you that the charge in this case, as I have taken it upon myself to amend the charge, and I might add over the legal objections, of course, of the defendant and with the assistance of the Government, after looking at all the authorities I have been able to examine up to the moment, the charge now reads that in Count One:

'That on or about April 15, 1964, the defendant did wilfully and knowingly attempt to evade and defeat a large part of the income tax due

and owing for the calendar year '63'—and so forth, everything else is the same.

'And then the charge in Count Two is: 'That on or about the 15th day of April, 1965, for the calendar year 1964, the defendant attempted to evade income tax.'

Now, of course, as I say, the charge is denied by the not guilty plea of the accused, and you're not to draw any inference whatsoever from the charge. It merely sets in motion the wheels of justice." [Rep. Tr. p. 75, lines 19-24; p. 76, lines 1-25; p. 77, lines 1-7.]

The case then proceeded summarily to jury trial, ultimately concluding with the conviction of petitioner on both of the amended counts. Notice of Appeal was entered on June 22, 1970, and Notice of Appeal was filed on June 30, 1970. Briefs of petitioner and respondent were duly filed with the Court of Appeals for the Ninth Circuit and the said court heard oral argument of counsel on April 7, 1971. On April 8, 1971, the said United States Court of Appeals for the Ninth Circuit entered its decision herein. (Appendix 1a)

Counsel for petitioner, prior to the court's amendment of the Grand Jury's indictment by a writing on the face thereof; at the time of such amendment; at the conclusion of respondent's case; at the conclusion of petitioner's case; by formal written motions filed with the court and subsequently argued in open court and at the time of sentencing, repeated and reiterated his motions for dismissal of the indictment, for judgment of acquittal notwithstanding the verdict, and in the alternative, for a new trial. All of said motions were denied by the trial court.

Reasons for Granting the Writ.

1. The decision below violates the Fifth Amendment of the United States Constitution in two respects:

(a) In that petitioner was held to answer for an infamous crime on an indictment of the court in lieu of indictment by a Grand Jury of his peers.

(b) In that petitioner, having been placed in jeopardy under an indictment of the Grand Jury, was again placed in jeopardy for the same offense and forced to go to trial under a substituted indictment of the court.

2. The decision below is in direct conflict with decisions of the Supreme Court of the United States, including but not limited to *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849; *Stirone v. United States,* 361 U.S. 212, 4 L. Ed. 2d 252; *Russell v. United States,* 369 U.S. 749, 8 L. Ed. 2d 240.

3. The decision below is in direct conflict with a multitude of decisions of the various Circuit Courts of Appeal.[2]

4. The decision below flies in the face of the established principles laid down in *Bain, Stirone* and *Russell* and tends to accelerate an erosion of rights, guaranteed under the Fifth Amendment of the United States Constitution, to the point where confusion, inconsistency and laxity prevail. It is necessary for the purposes of uniformity and the good administration of justice that a Writ of Certiorari be granted in order that this Court may establish guide lines and reestablish order on the all-important issue of amendment of the Grand Jury indictment. The decision below, together with the Ninth Circuit decision in *Heisler v. United States* (C.A. 9, 1968) 394 F. 2d 692, cert. denied, 393 U.S. 986, 21 L. Ed. 2d 448, constitute a plea to this Court for order and clarification.

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[2]See footnote 1 above.

DISCUSSION.

1. The Decision Below Is Patently Erroneous, and When Read With Heisler v. United States (Ninth Circuit), It Begs Certiorari.

The decision below is terse and taunting. It is respectfully asserted that it was intended to provoke this appeal. It is flatly contrary to a rigid adherence to the rule of *Bain* prevailing in the Ninth Circuit since 1926.[3] In half-hearted support of its ostensible position, the court below cites but one authority. The court below steps right over the long line of decisions laid down through the years in its own jurisdiction[4] and footnotes *Stewart v. United States* (C.A. 8, 1968) 395 F. 2d 484. It closes five short paragraphs with the following afterthought:

> "Further, we would hold that this particular indictment did not require the amendments so amendments did not prejudice the defendant. The variance in the proof from the original indictment still could have permitted the case to go to the jury."

This statement is patently erroneous. Count One of the Grand Jury's indictment was barred on its face by the Statute of Limitations. That wouldn't require some amending if the defendant was to be convicted?

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[3]*Stewart v. United States* (C.A. 9, 1926) 12 F. 2d 524.

[4]*Stewart v. District Court* (C.A. 9, 1926) 16 F. 2d 863, cert. denied, 273 U.S. 755, 71 L. Ed. 875; *Armstrong v. United States* (C.A. 9, 1926) 16 F. 2d 62, cert. denied, 273 U.S. 766, 71 L. Ed. 881; *Edgerton v. United States* (C.A. 9, 1944) 143 F. 2d 697; *Carney v. United States* (C.A. 9, 1947) 163 F. 2d 784, cert. denied, 332 U.S. 824, 91 L. Ed. 400; *Chow Bing Kew v. United States* (C.A. 9, 1957) 248 F. 2d 466, cert. denied, 355 U.S. 899, 2 L. Ed. 2d 188; *Heisler v. United States* (C.A. 9, 1968) 394 F. 2d 692, cert. denied, 393 U.S. 986, 21 L. Ed. 2d 448; *Harvey v. United States* (C.A. 9, 1970) 428 F. 2d 782.

As to the matter of variance, it must be remembered that these amendments were made by the court, after discussions with the United States Attorney, *before* introduction of any evidence or testimony. Further, alluding to a variance, the trial court found:

> "* * * the jury will be so confused they won't know what you are talking about." [Rep. Tr. p. 53, lines 24-25 and p. 54, line 1.]
>
> * * *
>
> "* * * I don't think you can submit it intelligently to this jury without the complaint being amended." [Rep. Tr. p. 64, line 25, p. 65, lines 1 and 2.]
>
> * * *
>
> "But this thing would be fraught with error and utter confusion if we attempted to go forward." [Rep. Tr. p. 70, lines 10, 11.]

If it is true that the abrupt and unreasoned decision below is begging this appeal, why should that be?

Let us examine the Ninth Circuit decision in *Heisler v. United States,* 394 F. 2d 692, cert. denied, 393, U.S. 986, 21 L. Ed. 2d 448. There, in a well reasoned decision, the Court of Appeals for the Ninth Circuit analyzed its position and expressed its perplexity as follows:

> "This Court has been as strict as any in applying the *Bain* rule. (Citing many cases).[5]
>
> * * *
>
> "It is not easy, if it is possible at all, to reconcile these cases with cases holding that an amendment is proper if it is merely one of 'form' rather than 'substance', that the caption of the indict-

[5] *Cf.* Footnote 4.

ment can be amended, that mere clerical error in the body of the indictment is not fatal and that the jury can be told to disregard it, that clerical error in the body of the indictment can be corrected, that it is proper to withdraw from the jury's consideration a part of the charge in a single count, this being said not to be an amendment, and that it is proper to strike surplusage, but not by amending the indictment. Surely, in this enlightened age, it makes little sense to hold that a court may 'strike' language from an indictment, and tell the jury to disregard it, but may not actually amend the face of the indictment to conform to its order. Yet that is what the cases say. *In short, we think that the progeny of Bain are out of joint. We do not, however, think that the present case was born to set them right.*" (Emphasis supplied.)

* * *

"We reversed in Stewart v. United States, supra. But in Stewart v. District Court, supra, we held that the court could rescind the amendment and retry the defendant on the original indictment. Here, the trial not having been to a jury, we see no need for such hocus pocus. In substance, Heisler was tried and found guilty on the indictment as presented by the grand jury. The order amending was a work of supererogation, and can be disregarded as harmless, since, as we held in Stewart v. District Court, supra, it was void, and, as we hold here, the face amount of the note was not an essential element of the offense. *However, we suggest to the District Courts and to the bar that, for the present at least, the only safe course is*

> *never to amend the body of an indictment, either on its face or by order not carried out to the point of changing the face of the paper.*" (Emphasis supplied.)

It is respectfully urged that if "the progeny of Bain are out of joint", this *is* the case born to set them right. The decision below begs certiorari.

2. What Constitutes "Surplusage"?

It was contended by the respondent below that the very dates of the alleged attempts, *i.e.*, "April 15, 1963" in Count One and "April 15, 1964" in Count Two were surplusage.

> United States Attorney: "The portion of the indictment on or about such and such a date the Government submits is surplusage which your Honor can amend that properly." [Rep. Tr. p. 65, lines 6-8.]

Rule 7(d) of the Federal Rules of Criminal Procedure provides:

> "Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information."

It will be noted that no provision for *amendment* was made in the Federal Rules because the ruling in *Bain* rests upon Constitutional requirements.[6]

Rule 7(d) contemplates a motion by the defendant allowing the striking of prejudicial or redundant surplusage. No such motion, of course, was made by the petitioner below. It is ridiculous to contend, however, that the very dates of the alleged attempts (which the

[6]Advisory Committee 18 U.S.C., Rule 7(d).

court changed by writing in the body of the indictments) were "surplusage". The court stated the proper significance of these dates as follows:

> The Court: "I think, on the other hand, it might well be assumed, and I think more reasonably assumed, that he did the evasion on the filing of April 15, '63, but it was for the calendar year '62. I don't think it matters what calendar year it was for. The question is when is it charged that he did the evading. When was the attempt made to evade, that was allegedly by the tax return, regardless of what taxable year it might cover." [Rep. Tr. p. 28, lines 13-21.]
>
> * * *
>
> The Court: "What I'm getting at is the *essence of the charge* is not that the return, allegedly to have been illegal in the first count, was filed for the year '63. That isn't the essence of the charge.
>
> *The essence of the charge* is that there was an attempt to evade on April 15, '63, regardless of what year it was for." (Emphasis supplied.) [Rep. Tr. p. 30, lines 10-16.]

As it will be seen from the above, the dates which were changed by the court were, rather than mere "surplusage", considered to be the very *"essence" of the charge.*

"Surplusage" does not seem to be well defined in the authorities, but attaching a reasonable meaning to the word, it would appear to include any unnecessary or repetitious matter which could be removed without changing the clear meaning of the indictment. Certainly the contention of the respondent is without merit,

and if the Circuit Court's decision below (a copy of which appears in Appendix 1(a) hereof) leans to any extent on such a contention, which is certainly not clear, this would be error in the extreme.

3. What Is Meant by the Words "Merely a Matter of Form"?

Rule 52(a) of the Federal Rules of Criminal Procedure reads:

> "(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

In *Russell* (369 U.S. at p. 770) this Court stated:

> "This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless *the change is merely a matter of form.*" (Emphasis supplied.)

Thus, by implication this court has indicated that "mere matters of form" might reasonably be the subject of amendment of a Grand Jury indictment.[7]

As seen above, the trial court considered the dates of the alleged attempts to evade and defeat the tax as the very essence of the charges. These dates, which were changed by the court in writing, would be the dates starting the running of the Statute of Limitations, and for this reason alone, would have to be treated as words of critical substance.

The *date* and *act* of filing the allegedly false and fraudulent tax returns, under 26 U.S.C. §7201, are the

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[7] *Cf. Stewart v. United States* (C.A. 8, 1968) 395 F. 2d 484, the only supporting authority cited in the decision below.

very dates of the "attempt" referred to in the statute and constitute the fraudulent *act* which is the basic element of the offense.

No amount of concealment or evil, greedy endeavors constitute an "attempt" to evade and defeat the tax under 26 U.S.C. §7201, unless and until a false return is filed, and the *date of such filing is one of the most critical allegations in the indictment.* See *Spies v. United States* (1943) 317 U.S. 892, 87 L. Ed. 418. An attempt to evade and defeat the tax is not a continuing offense.[8]

To argue that the filing dates set forth in the Grand Jury's indictment, and subsequently changed in writing by the court, were mere formal assertions in the nature of surplusage, or comment without significance, is utter nonsense. They are a substantive requirement which go to the very essence of the crime.

4. If an Amendment of the Grand Jury's Indictment Is to Be Countenanced, When in the Proceedings Might It Be Proper?

Assuming, under Rules 7(c) and 52(a) of Federal Rules of Criminal Procedure, and under the implication of *Russell,* as well as *Stewart v. United States* (C.A. 8, 1968) 395 F. 2d 484, that an amendment by the trial court of a Grand Jury's indictment might, under extreme circumstances be allowable and proper, the question arises as to when in the proceedings such amendment should be undertaken without conclusive violation of the defendant's rights. In the instant case the amendments were made by the trial judge, after

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[8]See *Norwitt v. United States* (C.A. 9, 1952) 195 F. 2d 127.

consultation with the United States Attorney, by writing on the face of the Grand Jury indictment and altering allegations of substance. The amendments were made *in anticipation of proof,* based solely on statements of the United States Attorney *before* the introduction of any evidence or testimony whatever.

It is in this area of "when" and "how" that basic conflict and confusion appears to exist among the Circuit Courts of Appeal.[9] In *Heisler, supra,* the Circuit Court of Appeals for the Ninth Circuit made a great point of the time and manner in which the amendment, therein approved, was made.[10]

One might ask, under the facts below, what were the trial court's alternatives when confronted, prior to the introduction of evidence, with the indictment to which petitioner voiced objections and motions to dismiss? The court had two reasonable alternatives. It could have, in response to petitioner's motions, dismissed both counts of the indictment, one being barred on its face by the Statute of Limitations, and neither, according to the court's own findings, stating a cause

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[9]See *Stirone v. United States* (1960) 361 U.S. 212, 4 L. Ed. 2d 252; and *Lund v. United States* (C.A. 8, 1927) 19 F. 2d 46; *Gridley v. United States* (C.A. 6, 1930) 44 F. 2d 716, cert. denied, 283 U.S. 827 (1931); *United States v. Empire Hat and Cap Mfg. Co.* (D.C. Pa. 1942) 47 F. Supp. 395; *United States v. Denny* (C.A. 7, 1947) 165 F. 2d 688, cert. denied, 33 U.S. 844 (1948); *Williams v. United States* (C.A. 5, 1950) 179 F. 2d 656, aff'd. 341 U.S. 97, 95 L. Ed. 774; *Johnson v. United States* (C.A. 5, 1953) 207 F. 2d 314, cert. denied, 347 U.S. 938, 98 L. Ed. 1087.

[10]*Heisler v. United States* (394 F. 2d at p. 696).

"The court indicated, before it acted on the motion to amend, first, that the Government had proved its case, and second, that the variance was not fatal, conclusions with which we fully agree. The order granting the motion to amend was simultaneous with the adjudication of guilt."

of action. It is respectfully submitted that this is what the trial court *should* have done, allowing the United States Attorney, if he so desired, to resubmit the matter to the Grand Jury.

The other alternative would have been to order the trial to proceed, *without amendment to the Grand Jury's indictment,* reserving the right to rule on motions, consider amendments to conform to proof, and examine the effect of variances after all the evidence was before the court.[11]

It is respectfully and urgently emphasized that if the decision below is permitted to stand, allowing a trial judge, in consultation with the United States Attorney, to amend the Grand Jury's indictment (when the defendant stands in jeopardy) *before* the introduction of any evidence, then the guarantees afforded by the Fifth Amendment to the Constitution of the United States and *Bain, Stirone* and *Russell* are rendered meaningless.

5. Constitutional Questions Involved.

In *Russell,* this Court held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars fully serves the functions of apprising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a Grand Jury. Citing *Bain,* this Court said (369 U.S. at p. 770):

> "* * * To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the

[11] *Cf. Stirone.*

intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

In the decision below, the Court of Appeals for the Ninth Circuit said "Defendant really knew what years were involved." This is an assumption not supported in fact or in the record, but it is the respectful contention of petitioner that such an observation is irrelevant. A defendant is entitled to be charged for an infamous crime only upon indictment of the Grand Jury and should not be required to conjecture or guess as to what the prosecuting attorney may have intended, or suggested by *innuendo,* or otherwise, during preliminary investigation of the case.

The rule of *Bain,*[12] resting on the Fifth Amendment to the United States Constitution, guarantees the right of a defendant to be held to answer *only* under the al-

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[12]*Ex parte Bain* (121 U.S. at p. 13).

"It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

legations of an indictment returned by a Grand Jury of his peers. Supposition as to knowledge which might be imputed to him is not a game in which the court can indulge.

This Court aptly and clearly summarized the law of the land on this issue in *Russell,*[13] as well as *Stirone, supra,* and *Norris v. United States* (1930) 281 U.S. 619, 74 L. Ed. 1076.[14]

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[13]*Russell v. United States* (369 U.S. at pps. 770 and 771).

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. Ex parte Bain, 121 US 1, 30 L ed 849 7 S Ct 781; United States v. Norris, 281 US 619, 74 L ed 1076, 50 S Ct 424; Stirone v United States, 361 US 212, 4 L ed 2d 252, 80 S Ct 270. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' Ex parte Bain, supra (121 US at 10, 13). We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' Stirone v United States, supra (361 US at 218)."

[14]*Norris v. United States* (281 U.S. at p. 622).

"If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added

(This footnote is continued on the next page)

If the decision below, and the existing chaos and confusion which prevails among many of the Circuit Courts of Appeal, is condoned by forbearance, the rule of *Bain, Stirone* and *Russell* is swept away. If erosion of the clear and forceful admonition set forth in these cases, based on the Fifth Amendment to the Constitution of the United States, is accelerated by silence, a defendant's right to indictment by a Grand Jury and protection against double jeopardy will, for all practical purposes, be obliterated.

It is imperative that the "progeny of *Bain*" be set aright. What a *dangerous precedent* would be established if the decision below is permitted to stand. The Ninth Circuit Court's position, expressed through the decision below and *Heisler, supra,* amounts to an entreaty for certiorari which this Court, in the interest of consistency and the orderly administration of justice, most respectfully cannot in good conscience ignore.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

F. EDWARD LITTLE,
Attorney for Petitioner.

THOMAS A. BAIRD,
BAIRD, HOLLY, GALEN & WILLARD,
Of Counsel.

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to an indictment without the concurrence of the Grand Jury by which the bill was found."

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Richard A. Buble, Appellant. No. 26,550.

April 8, 1971.

On Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, BROWNING and WRIGHT, Circuit Judges.

PER CURIAM:

In this income tax fraud case there were two counts in the indictment. At issue were Buble's returns for the calendar years 1963 and 1964. Erroneously the indictment said the 1963 return was filed in April 1963 and the 1964 return was filed in April 1964.

Obviously, the literal figures made no sense. One must file his return after the end of the calendar year. The trial court amended the indictment to read that the 1963 return was filed in April 1964 and the 1964 return was filed in April 1965.

We hold that such an error, obvious to the defendant, could be corrected as it was* and that the double jeopardy argument has no merit.

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*See, *e.g.*, *Stewart v. United States* (8th Cir. 1968), 395 F.2d 484.

Defendant really knew what years were involved. We did not find a different result required by *Russell v. United States* (1961), 369 U.S. 749; *Stirone v. United States* (1959), 361 U.S. 212; *Ex parte Bain* (1887), 121 U.S. 1; *United States v. Harvey* (9th Cir. 1970), 428 F.2d 782; *Gaither v. United States* (D.C. Cir. 1969), 413 F.2d 1061; *Heisler v. United States* (9th Cir. 1968), 394 F.2d 692.

Further we would hold that this particular indictment did not require the amendments, so amendments did not prejudice the defendant. The variance in the proof from the original indictment still could have permitted the case to go to the jury.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States, No. ....., October Term, 1970.

Richard A. Buble, Petitioner, vs. United States.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 7, 1971

W. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of May, 1971

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee vs Richard A. Buble, Defendant-Appellant. No. 26550.

Filed, May 7, 1971.

Upon application of F. Edward Little counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before June 7, 1971.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

R. H. CHAMBERS
United States Circuit Judge.

Dated: San Francisco, Calif. May 4, 1971.

Indictment.

[26 U.S.C. §7201—Wilful Attempt to Evade and Defeat Income Tax.]

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Richard A. Buble, Defendant. No. 37434 CD.

Filed: April 1, 1970.

The Grand Jury charges:

COUNT ONE
[26 U.S.C. §7201]

That on or about the 15th day of April, 1963, in the Central Division of the Southern District of California, defendant RICHARD A. BUBLE, a resident of Los Angeles County, who during the calendar year 1963 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1963, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of ($119.67) and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $19,081.18, upon which said taxable income there was owing to the United States of America an income tax of $4,967.60.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

COUNT TWO

[26 U.S.C. §7201]

That on or about the 15th day of April, 1964, in the Central Division of the Southern District of California, defendant RICHARD A. BUBLE, a resident of Los Angeles County, who during the calendar year 1964 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1964, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for the said calendar year was the sum of ($58.35) and that the amount of tax due and owing thereon was the sum of $0, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $23,259.46, upon which said taxable income there was owing to the United States of America an income tax of $5,828.22.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A TRUE BILL
/s/ Charles W. Hall, Jr.
Foreman.

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States Attorney